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1 filed an original state habeas petition in the California Supreme Court.¹ On March 19, 2008, the
2 California Supreme Court denied the petition. Petitioner filed unsuccessful appeals to the
3 California Court of Appeal and the California Supreme Court.

4 On February 10, 2010, petitioner filed a federal habeas petition pursuant to 28 U.S.C.
5 § 2254 in *Thomas v. Kramer*, No. 10-0591 LHK (N.D. Cal.).² In that petition, petitioner raised
6 the following claims: (1) trial counsel rendered ineffective assistance, (2) the prosecutor
7 committed misconduct, and (3) appellate counsel rendered ineffective assistance. The court
8 concluded that the petition was a mixed petition and directed petitioner to choose how he would
9 like to proceed. Ultimately, because of a failure to prosecute, *Thomas v. Kramer*, No. 10-0591
10 LHK (N.D. Cal.), was dismissed without prejudice.

11 On June 22, 2011, petitioner filed another state habeas petition in the California Supreme
12 Court. In his petition, petitioner raised the following claims: (1) the pre-trial identification
13 procedure was improperly suggestive, and violated his right to due process; (2) trial counsel
14 rendered ineffective assistance and had a conflict of interest when he told the jury that petitioner
15 was guilty of burglary; (3) appellate counsel had a conflict of interest; and (4) the prosecutor
16 committed misconduct during closing argument. On November 2, 2011, the California Supreme
17 Court summarily denied petitioner's state habeas petition with a citation to *In re Robbins*, 18
18 Cal. 4th 770, 780 (1998) (explaining state courts' untimeliness determination), and *In re Clark*, 5
19 Cal. 4th 750, 767-69 (1993) (explaining the state rule against successive, piecemeal or
20 repetitious claims).

21 Petitioner filed the underlying federal habeas petition on February 29, 2012. Petitioner
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23 ¹ The court takes judicial notice of the proceedings initiated by petitioner's state habeas
24 petition in Case No. S156953, filed in the California Supreme Court on October 5, 2007. *See*
25 *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (internal quotation marks and citations
26 omitted) (recognizing that a district court "may take notice of proceedings in other courts, both
within and without the federal judicial system, if those proceedings have a direct relation to
matters at issue.").

27 ² The court takes judicial notice of the pleadings filed in *Thomas v. Kramer*, No. 10-0591
28 LHK (N.D. Cal.).

1 raised the same claims in this federal petition as he did in his 2011 California Supreme Court
 2 petition. Respondent filed a motion to dismiss, arguing that California Supreme Court's
 3 summary denial containing the citations to *Robbins* and *Clark* barred federal review of the
 4 federal claims. The court denied respondent's motion, concluding that the citation to *Clark* was
 5 not an independent and adequate state bar, but the citation to *Robbins* was. The court further
 6 stated that because it was unclear which citation the California Supreme Court intended to apply
 7 to which claim(s), the procedural bar was inapplicable.

8 DISCUSSION

9 Respondent has filed a motion for reconsideration. Specifically, respondent urges the
 10 court to reconsider its ruling that the state court's order was ambiguous. Respondent states that
 11 this court could have resolved that "the *Clark* bar on successive petitions applied only to the two
 12 claims that had already been raised in a previous state habeas petition, i.e., ineffective assistance
 13 of trial counsel and prosecutorial misconduct." (Doc. No. 32 at 3.) Respondent further argues
 14 that, "the *Robbins* bar applied *at least* to the two non-successive claims of ineffective assistance
 15 of appellate counsel and suggestive identification." (*Id.*)

16 Rule 60(b) of the Federal Rules of Civil Procedure provides for reconsideration where
 17 one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable neglect;
 18 (2) newly discovered evidence that by due diligence could not have been discovered before the
 19 court's decision; (3) fraud by the adverse party; (4) voiding of the judgment; (5) satisfaction of
 20 the judgment; (6) any other reason justifying relief. *See* Fed. R. Civ. P. 60(b); *School Dist. 1J v.*
 21 *ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

22 After reviewing the record, the court agrees that the denial of respondent's motion to
 23 dismiss was erroneous, and grants reconsideration under Rule 60(b)(6) for reasons slightly
 24 different from respondent's arguments. After initialing determining that the *Clark* citation could
 25 not bar the two claims previously presented, i.e., ineffective assistance of trial counsel and
 26 prosecutorial misconduct, the court did not continue its analysis to determine whether both *Clark*
 27 and *Robbins* could bar the remaining two claims, i.e., ineffective assistance of appellate counsel
 28

1 and suggestive identification procedures.

2 In *Koerner v. Grigas*, 328 F.3d 1039, 1051-52 (9th Cir. 2003), the Ninth Circuit left open
3 the possibility that under some circumstances, a federal court may be able to resolve an
4 ambiguous order. Here, upon reconsideration, the court concludes that, as applied to petitioner's
5 Claims 1 and 3, i.e., the claims of ineffective assistance of appellate counsel and suggestive
6 identification procedures, both the *Robbins* and *Clark* citations are procedural bars to federal
7 habeas review.

8 In petitioner's 2007 state supreme court petition, petitioner raised the following two
9 claims: (1) trial counsel rendered ineffective assistance, (2) the prosecutor committed
10 misconduct. The California Supreme Court denied the petition without comment. Then, in
11 2011, petitioner filed another state supreme court petition, in which he raised the same two
12 claims, and added: (1) the pre-trial identification procedure was improperly suggestive, and
13 violated his right to due process, and (2) appellate counsel had a conflict of interest.

14 Petitioner's claims are barred from federal review only if the court determines that both
15 *Clark* and *Robbins* are independent and adequate state bars against each claim. *Washington v.*
16 *Cambra*, 208 F.3d 832, 833-34 (9th Cir. 2000). "This is so because the California Supreme
17 Court invoked both rules without specifying which rule applied to which" claim or claims. *Id.* at
18 834.

19 Claims 2 and 4 were previously presented to the California Supreme Court in 2007, and
20 fairly presented, so the *Robbins* rule regarding timeliness would not procedurally bar those
21 claims from consideration in the federal court. Similarly, because Claims 2 and 4 were
22 previously presented to the California Supreme Court, and were denied on the merits, *Clark's*
23 rule against repetitious claims do not bar federal habeas review. Thus, the remaining question is
24 whether *Robbins* and *Clark* are independent and adequate bars as applied to Claims 1 and 3. If
25 both *Robbins* and *Clark* are independent and adequate as to Claims 1 and 3, the California
26 Supreme Court's order is not ambiguous and the court is precluded from considering Claims 1
27 and 3.

Here, as stated in previous orders, *Robbins* is an independent and adequate state bar. *Walker v. Martin*, 131 S. Ct. 1120, 1131 (2011); *Bennett v. Mueller*, 322 F.3d 573, 582-83 (9th Cir. 2003). As for *Clark*, *Clark* states that, “It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment.” *Clark*, 5 Cal. 4th at 767-68. Claims 1 and 3 were not presented to the California Supreme Court until 2011 – five years after petitioner was sentenced for the crimes for which he is attacking. Claim 1 was clearly known to petitioner at the time of trial in 2006. Claim 3 was known to the petitioner, at the latest, on January 18, 2007.³ Petitioner filed his first state habeas petition, i.e., Case No. S156953, in the California Supreme Court on October 5, 2007. Therefore, both Claims 1 and 3 were “newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment.” *Clark*, 5 Cal. 4th at 767-68.

Because *Clark* is an independent and adequate state procedural bar against Claims 1 and 3, *see Williams v. Newland*, 2002 WL 31528502, *3-*4 (N.D. Cal. 2002) (explaining that after 1998, *Clark* was an independent and adequate state bar), this court is precluded from reviewing Claims 1 and 3 unless petitioner has shown cause and prejudice.

If the court finds an independent and adequate state procedural ground supporting the state court denial of a habeas petition, federal habeas review is barred unless the prisoner can demonstrate cause for the procedural default and actual prejudice, or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice. *See Coleman*, 501 U.S.

³ In Claim 3, petitioner alleges that appellate counsel was ineffective due to a conflict of interest. Petitioner claimed that the prosecutor requested that the appellate court appoint counsel for petitioner, and once counsel was appointed, counsel “did not wish to raise sufficient grounds [and said] that ‘he was not going to bite the hand that fed him.’” Petitioner went on to state that appellate counsel only raised one issue and refused to raise the issues that petitioner requested. Because the appellate case was fully briefed on January 18, 2007, this is the latest date upon which petitioner knew the factual basis of his claim.

1 at 750. Here, petitioner does not address cause or prejudice. However, petitioner does intimate
2 that the failure to address his claims on the merits would result in a miscarriage of justice.

3 By the traditional understanding of habeas corpus, a “miscarriage of justice” occurs
4 whenever a conviction or sentence is secured in violation of a constitutional right. *See Smith v.*
5 *Murray*, 477 U.S. 527, 543-44 (1986). However, the Supreme Court limits the “miscarriage of
6 justice” exception to habeas petitioners who can show that “a constitutional violation has
7 probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S.
8 298, 327 (1995). Under this exception, a petitioner may establish a procedural “gateway”
9 permitting review of defaulted claims if he demonstrates “actual innocence.” *Id.* at 316 & n.32.

10 “To be credible, such a claim requires petitioner to support his allegations of
11 constitutional error with new reliable evidence – whether it be exculpatory scientific evidence,
12 trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.”
13 *Id.* at 324. A petitioner’s burden at the gateway stage is to demonstrate that more likely than not,
14 in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable
15 doubt “or, to remove the double negative, that more likely than not any reasonable juror would
16 have reasonable doubt.” *Id.* at 329. “[A]ctual innocence” means factual innocence, not merely
17 legal insufficiency. *See Bousley v. United States*, 523 U.S. 614, 623-24 (1998).

18 Here, petitioner does not allege that there is any new reliable evidence that was not
19 presented at trial. Petitioner argues that there was a “very substantial likelihood of irreparable
20 misidentification,” (doc. no. 22 at 7), and that counsel was ineffective because he harbored a
21 conflict of interest (doc. no. 22 at 8). Neither of these arguments persuades the court to believe
22 that it is more likely than not that any reasonable juror would have reasonable doubt as to
23 petitioner’s guilt or factual innocence.

24 Therefore, review of petitioner’s Claims 1 and 3 are procedurally barred. Accordingly,
25 respondent’s motion for reconsideration is GRANTED. Respondent’s motion to dismiss is
26 GRANTED in part and DENIED in part. Petitioner’s Claims 1 and 3 are DISMISSED with
27 prejudice. Respondent is directed to show cause why a writ of habeas corpus should not be
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1 granted as to petitioner's Claims 2 and 4.

2 **CONCLUSION**

3 1. Respondent's motion for leave to file a motion for reconsideration is GRANTED.
4 The court's order denying respondent's motion to dismiss is VACATED. (Doc. No. 31.)
5 Respondent's motion to dismiss is GRANTED in part and DENIED in part. (Doc. No. 31.)
6 Claims 1 and 3 are DISMISSED with prejudice. Respondent is ordered to respond to
7 petitioner's Claims 2 and 4.

8 2. Respondent shall file with the court and serve on petitioner, within **sixty days** of
9 the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing
10 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.
11 Respondent shall file with the answer and serve on petitioner a copy of all portions of the
12 underlying state criminal record that have been transcribed previously and that are relevant to a
13 determination of the issues presented by the petition. If petitioner wishes to respond to the
14 answer, he shall do so by filing a traverse with the court and serving it on respondent within
15 **thirty days** of the date the answer is filed.

16 3. Respondent may file a motion to dismiss on procedural grounds in lieu of an
17 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section
18 2254 Cases within **sixty days** of the date this order is filed. If respondent files such a motion,
19 petitioner shall file with the court and serve on respondent an opposition or statement of non-
20 opposition within **twenty-eight days** of the date the motion is filed, and respondent **shall** file
21 with the court and serve on petitioner a reply within **fourteen days** of the date any opposition is
22 filed.

23 4. It is petitioner's responsibility to prosecute this case. Petitioner is reminded that
24 all communications with the court must be served on respondent by mailing a true copy of the
25 document to respondent's counsel. Petitioner must keep the court and all parties informed of any
26 change of address by filing a separate paper captioned "Notice of Change of Address." He must
27 comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal
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of this action for failure to prosecute. *See* Fed. R. Civ. P. 41(b).

IT IS SO ORDERED.

DATED: 6/4/14



LUCY H. KOH
United States District Judge